

FILE COPY

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1944

No. 92-15

HARRY E. WHITE,

Petitioner,

vs.

WM. F. STEER, Colonel, Infantry, United
States Army, Provost Marshal, Central
Pacific Area,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.**

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*To the Honorable Harlan Fiske Stone, Chief Justice
of the United States, and to the Honorable Asso-
ciate Justices of the Supreme Court of the United
States:*

Petitioner, Harry E. White, respectfully prays for
a writ of certiorari to the United States Circuit Court

of Appeals for the Ninth Circuit to review the final judgment of said Court entered November 1, 1944, reversing the final judgment of the District Court of the United States for the Territory of Hawaii.

OPINION BELOW.

The District Court's decision is not reported but is found in the record beginning at page 57. The opinion of the Circuit Court of Appeals is unreported to date. It appears in the record in Vol. 3, pages 706-751.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The United States Circuit Court of Appeals for the Ninth Circuit reversed the decision and judgment of the United States District Court for the District and Territory of Hawaii, in habeas corpus proceedings brought in behalf of Harry E. White, a civilian, confined in Oahu Prison under judgment and sentence of a military court, which tried and convicted him August 25, 1942, for violation of Chapter 183, Revised Laws of Hawaii 1935, viz. embezzlement.

The pertinent facts of the case are: That on December 7, 1941, a few hours after the Japanese attack on Pearl Harbor, the Governor of Hawaii by proclamation invoked Section 67, Hawaiian Organic Act (31 Stat. 1941 (1900) 48 U. S. C. 532), suspending the privilege of the writ of habeas corpus and placed the Territory under martial law. He called on the Com-

manding General to exercise the powers normally exercised by judicial officers and employees of the Territory, during the emergency and until danger of invasion was over (R. 57). The Commanding General assumed the title of "Military Governor" (R. 58) and immediately set up Military Commissions and Provost Courts for the trial of civilians "involving an offense committed against the Laws of the United States, the Laws of the Territory of Hawaii, or the rules, regulations, orders or policies of the military authority * * *" (R. 79).

Harry E. White, who was engaged in the stock brokerage business in Honolulu (R. 5), was accused August 20, 1942, of embezzling funds of a customer; he was arrested and brought before a provost court in Honolulu, presided over by a United States Army Major (R. 5). White challenged the jurisdiction of the provost court (R. 10), demanded a trial by jury (R. 11), and a continuance to prepare his defense (R. 11-13); but to no avail (R. 6-7). He was obliged to go to trial without a formal charge in writing. He was adjudged guilty of embezzlement and sentenced to five years imprisonment (R. 7 and 15).

In habeas corpus proceedings the United States district judge held that the military tribunal had no jurisdiction to try and sentence White for an offense in no way related to military operations or security and that the Governor, in attempting to delegate judicial power to a self-styled "Military Governor", exceeded his authority and the denial to White of his rights under the 5th and 6th Amendments of the Con-

stitution were without legal justification; and he was entitled to the relief prayed for in his petition (R. 57).

From the decision and judgment of the district judge, the provost marshal, respondent, appealed to the Circuit Court of Appeals for the Ninth Circuit, where the trial judge's decision and judgment were reversed and the petitioner remanded (R. 705).

Briefly stated, the decision of the Circuit Court of Appeals held that at the time White was tried, Hawaii was under total military government, and that his trial without benefit of the 5th and 6th Amendments was proper and the proceedings valid; that the privilege of the writ of habeas corpus was still suspended when he sought relief.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (43 Stat. 938; 28 U. S. C. A. Sec. 347).

QUESTIONS PRESENTED.

(1) Did the Military in Honolulu on August 25, 1942, have jurisdiction to try a civilian in a provost court for a felony involved in the violation of a municipal law?

(2) Aside from question (1), was petitioner given a fair trial within the meaning of due process, where, brought before the provost court, his counsel ill and

his defense requiring the study of complicated book-keeping entries, he was denied a reasonable continuance to prepare for trial and secure the attendance of witnesses in his favor?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

- (A) The Circuit Court of Appeals has decided an important question of constitutional law relating to the rights of an individual under the 5th and 6th amendments in war time and has decided the same contrary to a decision of this Court.

The decision of the Circuit Court of Appeals, in reversing the trial Court and holding that Harry E. White, a civilian stock broker in Honolulu charged with violation of a municipal law, viz. embezzlement with respect to a customer's money, was subject to trial and imprisonment by a military court, is in conflict with the decision of this Court in *Ex Parte Milligan*, 4 Wall. (U. S.) 2.

- (B) The Circuit Court of Appeals has given force and effect to a judgment and sentence of a military court, which denied petitioner in his trial rights deemed essential under the due process clause of the Constitution.

The decision of the Circuit Court of Appeals should be reversed, irrespective of whether Harry E. White was subject to trial before a military tribunal, for the reason that he was denied those things deemed essential to a fair trial, included in 'the fundamental principles of justice embraced in the conception of due process of law;'" particularly, to-wit, he was never

**Kwock Jan Fat v. White*, 253 U. S. 454.

confronted with a formal written charge or accusation, under oath or otherwise, against him, and though his counsel was ill and his defense required study of complicated bookkeeping entries, he was arbitrarily denied a reasonable continuance to prepare for trial and to secure attendance of witnesses in his favor.

ARGUMENT.

(A) THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW RELATING TO THE RIGHTS OF AN INDIVIDUAL UNDER THE 5TH AND 6TH AMENDMENTS IN WAR TIME AND HAS DECIDED THE SAME CONTRARY TO A DECISION OF THIS COURT.

Overnight on December 7, 1941, Hawaii changed from a legally constituted government to a military dictatorship, headed by the commanding general of the department, who assumed the title of "Military Governor" and the right to try and punish violators of all penal laws or ordinances and his own orders and "policies". Rights of the individual under the Constitution vanished.

No statutory authority existed for the establishment of such a government. Section 67 of the Organic Act (31 Stat. (1900) 153; 48 U. S. C. 432) was relied on and it was under the provisions of this section that Governor Poindexter suspended the privileges of the writ of habeas corpus and proclaimed martial law (R. 74).

The pertinent provisions of this section are:

"The Governor * * * may * * * in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the territory or any part thereof under martial law until communication can be had with the President and his decision thereon made known."

The Circuit Court of Appeals pointed out that the section was taken from the Constitution of the Republic of Hawaii. It will be noted that it is different, in an important particular, from Article I, Section 9 of the Federal Constitution.

In its opinion, the Court relied on *In re Kalani-anaole*, 10 Hawaii 29 (R. 717), which was decided in 1895—five years before the Constitution of the United States was extended to Hawaii—and dealt with the right of a military commission, clothed by a legislative enabling act, to try a principal in a conspiracy to overthrow the Republic under President Dole. The 5th and 6th Amendments and Article I, Section 9 of the Constitution were alien and had no application to the proceeding.

Article I, Section 9 of the Constitution permits the suspension of the privilege of the writ when and only when "*in case of rebellion or invasion the public safety may require it*". Section 67 would permit it not only when there is invasion or rebellion, but when there is *imminent danger of invasion*.

Much of the testimony produced by respondent was to show that at the time this proceeding began, twenty-

eight months after December 7, 1941, there was still imminent danger of invasion and hence legal justification for the suspension of the privilege of the writ. It is submitted Section 67 is valid only to the extent it is not in conflict with Article I, Section 9 of the Constitution and the 5th and 6th Amendments.

The several states in their Constitutions have varying provisions relating to the suspension of the great writ. They are not limited by the restriction of Article I, Section 9 of the Constitution (25 *Am. Jur.* p. 146). But organized territories are. *Rasmussen v. United States*, 197 U. S. 516; *O'Donoghue v. United States*, 289 U. S. 516. An organized territory is directly under the Constitution. Its restraints and restrictions are in full force and effect in Hawaii.

The Circuit Court of Appeals, in reversing the trial Court, said that at the time petitioner was tried, the Territory "appears to have continued under exclusive military rule" (R. 713) but does not point out any legal basis for such rule; whereas the trial Court specifically dealt with this matter, finding that while the Governor had the right and power to declare martial law and suspend the privilege of the writ of habeas corpus, he did not have power to delegate the functions of the duly established Courts of the United States and the Territory of Hawaii to the Commanding General (R. 69).

The basic function of martial law is to preserve order in an emergency and does not embrace the trial of civilians in military or provost courts for offenses wholly alien to the concerns of the emergency.

It is argued, however, in this case, that it was necessary to try petitioner before a provost court because juries at the time were not being impanelled. Such excuse cannot make the proceedings lawful and cannot give legal justification for denying petitioner trial in an ordained and established Court, before a jury and on an indictment found and returned by a grand jury.

When petitioner was arrested and tried the Courts were open and fully staffed and the judges, trained and experienced and serving under appointment of the President of the United States, were ready to perform their proper judicial duties, agreeable to their oath to support and defend the Constitution. But the "Military Governor" would not permit them to function. In their place and stead he created, without the slightest legal authority, provost courts and military commissions (R. 79) who, with astonishing disregard for the great judicial traditions of this country in the administration of justice, proceeded with their inept business in an atmosphere where the enlightened rays of the Constitution's Bill of Rights could never penetrate.

War, it has been said by this Court, does not suspend the safeguards of the Constitution; indeed in time of war their need is greater and a double duty of vigilance devolves on the Court to see they are not lost in the heat and distress of the conflict.

No contention was made that when petitioner was arrested and tried, in August, 1942, there was an invasion, or that there was disorder, or that the Courts were not able to perform their usual functions (R.

49, 53, 129). If the lightning, transit attack on Pearl Harbor on December 7, 1941, may be called an invasion, its existence was only momentary, and not even the commanding general claimed the continued existence of martial law was imperative (R. 264). In such a situation it is inconceivable that a civilian charged with a serious crime against local law should be tried before a military court and shorn of his rightful heritage under the Constitution.

The importance of this case may be gleaned from the fact that this is the first time the army has claimed the right to try and punish civilians on loyal domestic soil for offenses in no way related to military operations or objectives. Reference is made to *Ex parte Duncan*, decided by the Circuit Court of Appeals in the same opinion, for further argument on this phase of the case. Petition for certiorari in that case was filed concurrently with the petition in this case, and it is not believed the convenience of the Court will be served by duplication of the argument.

(B) THE CIRCUIT COURT OF APPEALS HAS GIVEN FORCE AND EFFECT TO A JUDGMENT AND SENTENCE OF A MILITARY COURT, WHICH DENIED PETITIONER IN HIS TRIAL RIGHTS DEEMED ESSENTIAL UNDER THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

Petitioner was put to trial before the provost court for a crime under the Hawaiian law with a ten year imprisonment provision (Chapter 183, *Revised Laws of Hawaii*, 1935)—enough to deprive him “of all that

makes life worth living".* Yet he was confronted with no written charge; was merely told by word of mouth what he was to be tried for (R. 25). *What he was told we do not know, for no record of it was preserved.* Here a step in a criminal proceeding of major importance was being taken, observed not in the usual way of furnishing the accused with a copy of the accusation, but merely by some impalpable words, now lost in oblivion. Requirements of due process cannot be thus easily satisfied. *Kwock Jan Fat v. White*, 253 U. S. 454.

Petitioner, when brought before the provost court, promptly objected to its jurisdiction over him (R. 10); demanded and was denied a jury trial (R. 11). He made a showing that his counsel was ill, that the transactions involved in his difficulties necessitated study of complicated bookkeeping entries, and that a continuance was necessary to prepare his defense (R. 11, 12). But no continuance was allowed him; he was forced to trial (R. 7).

Whether an individual is tried before a legislative Court, a commission, an administrative body or provost court—where the issue involved puts his property or liberty at stake—Courts will denounce a trial or hearing and grant relief where it has been held in such a way or with such undue haste as to prevent a fair presentation of the essential facts, determinative of the issue, or where a full record of what occurred has not been preserved. *Kwock Jan Fat v. White, supra*;

**Ng Fung Ho v. White*, 259 U. S. 276.

Ng Fung Ho v. White, supra; Powell v. Alabama, 287 U. S. 45.

At the hands of whatever agency, a man's vital rights shall be dealt with "*consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions*". *Herbert v. Louisiana*, 272 U. S. 312; 16 C. J. S. p. 1172.

To give petitioner a trial, and yet not give him an opportunity to prepare for his trial, or not to give him a copy of the accusation, falls far short of "the fundamental principles of justice embraced in the conception of due process of law". *Kwock Jan Fat v. White, supra*.

CONCLUSION.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit and that the final decree of said cause be reviewed and reversed.

Dated, Honolulu, Hawaii,

December 27, 1944.

HARRY E. WHITE.

Petitioner.

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